BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Investigation on the Commission's own motion into the rates, operations, practices, services and facilities of San Diego Gas & Electric Company and Southern California Gas Company.	I.07-02-013 (Filed February 15, 2007)

APPLICATION FOR REHEARING OF THE DIVISION OF RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK OF DECISION 08-07-046

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APPLICATION FOR REHEARING OF THE DIVISION OF RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK OF DECISION 08-07-046

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

On August 1, 2008, the Commission issued Decision ("Decision" or "D.") 08-07-046, *Decision on the Test Year 2008 General Rate Cases for San Diego Gas & Electric Company and Southern California Gas Company.* Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure[1], the Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN) file this Application for Rehearing of the Decision.

[1] Rule 16.1 provides that an application for rehearing shall be filed within 30 days after the date the Commission mails the order or decision.

Decision 08-07-046 adopts Settlements to which DRA, TURN and the Sempra Utilities are signatories and which resolve all issues associated with the test year revenue requirements for the utilities.[2] Although this Decision adopts these Settlements, it includes language which, if allowed to stand, violates the rights of DRA, TURN and potentially other consumer advocates under the Constitutions of the United States and the State of California. D.08-07-046 also contains language which impermissibly attempts to bind future Commissions, gives the appearance of prejudging evidence in future proceedings, and is arbitrary and capricious.

DRA and TURN ask the Commission to grant rehearing of D.08-07-046 and remove the language identified below and the corresponding Findings of Fact and Conclusions of Law.

II. BACKGROUND

Decision 08-07-046 adopts the following Settlements to which DRA and TURN are signatories: the Test Year 2008 Settlement for San Diego Gas & Electric Company (SDG&E) with DRA; the Test Year 2008 Settlement for Southern California Gas Company (SoCalGas), with DRA and TURN; the Post Test Year Ratemaking Settlement for SDG&E with DRA, TURN and the Aglet Consumer Alliance (Aglet); and the Post Test Year Ratemaking Settlement for SoCalGas with DRA, TURN, and Aglet. As the Decision notes, the above Settlements are based on a considerable evidentiary record, they are reasonable in light of that record, consistent with the law and in the public interest.[3] Granting Rehearing as DRA and TURN request will not affect the Commission's adoption of the Settlements. The language that DRA and TURN ask the Commission to remove does not affect the revenue requirement adopted by the Commission; rather, it is extraneous and irrelevant to the outcome of this proceeding.

Decision 08-07-046 is based on the Alternate Proposed Decision (APD) of Commissioner Bohn which, in turn, was based on the Proposed Decision (PD) of

[2] Motion of Joint Parties (SDG&E and DRA) for Adoption of Settlement Agreement Regarding Test Year 2008 Revenue Requirement, and Motion of Joint Parties (SoCalGas, DRA and TURN) for Adoption of Settlement Agreement Regarding Test Year 2008 Revenue Requirement, p. 2.

[3] D.08-07-046, pp. 14-16.

Administrative Law Judge Douglas Long. Both the PD and the APD selected a few issues out of the hundreds contested by the parties and admonished DRA, TURN and UCAN not to make certain arguments in future proceedings. The PD and APD also made findings that did not consider relevant, factual evidence in the record.

For example, in connection with Depreciation, a revenue requirement issue that *was* resolved in the Revenue Requirement Settlements, the PD and APD stated as follows: "We therefore deny with prejudice the recommendations of DRA, TURN and UCAN on depreciation and net salvage. The purpose of this denial is to avoid an unnecessary repetition in subsequent proceedings."[4] In connection with Incentive Compensation, also a settled issue, the APD stated, "We find no merit in DRA's argument that shareholders should fund the incentive portion of market-based employee compensation."[5]

DRA and TURN separately filed Comments on the PD and APD in which they asked, among other things, that these and other content-based strictures on future speech be removed from the final decision. Rather than remove all of the passages, however, Decision 08-07-046 modifies some and adds others apparently attempting to cure the Constitutional and other legal errors. The legal and factual errors still to be corrected are described below.

III. STANDARD OF REVIEW

Rule 16.1 directs applicants for rehearing to "...set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous."[6] Public Utilities Code Section 1757 provides that, when a reviewing court undertakes consideration of the validity of a Commission decision, it considers, among other things, whether the "order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution."[7] A

[4] APD, p. 22.
[5] APD, p. 21.
[6] Rule 16.1.
[7] Public Utilities Code §1757(a)(6)

reviewing court will also consider whether the "commission acted without or in excess of, its powers or jurisdiction"[8] or whether "...the findings in the decision of the commission are not supported by substantial evidence in light of the whole record."[9]

The specific portions of D.08-07-046 discussed below violate the U.S. and California Constitutions, Public Utilities Code Section 1708, appear to prejudge evidence in future proceedings, and are arbitrary and capricious in that they are not supported by the record, and, in fact, are often contradicted by it. Since this language is unnecessary to the outcome the Commission adopted, the Commission should grant rehearing as DRA and TURN request and remove it.

IV. D.08-07-046 VIOLATES THE RIGHTS OF DRA, TURN AND POTENTIALLY OTHER CONSUMER ADVOCATES UNDER THE U.S. AND CALIFORNIA CONSTITUTIONS

Section 5.2 of D.08-07-046 is entitled "Unresolved Test Year Issues," and lists six issues out of the hundreds originally disputed by parties in the Sempra Utilities' rate cases.[10] Of the six issues singled out in Section 5.2, four were subsumed within the Revenue Requirement Settlement Agreements that D.08-07-046 adopts. They are Depreciation expense, funding for Incentive Compensation, Working Cash expense, and the Employee Stock Ownership Plan (ESOP) tax deduction.[11]

Although the Decision terms these issues "unresolved," the Settlement Agreements between the Sempra Utilities and DRA, and TURN, in the case of the SoCalGas revenue requirement, left none of these *revenue requirement* issues outstanding. As the Motion of Joint Parties for each of the Revenue Requirement Settlements says, "[t]he Settlement Agreement resolves or otherwise disposes of all the issues associated with [the utility's] test year 2008 revenue requirement."[12]

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[8] Public Utilities Code §1757(a)(1) and (a)(3).

[9] Public Utilities Code §1757(a)(1) and (a)(4).

[10] See, e.g., Joint Comparison Exhibits.

[11] The remaining two issues listed in Section 5.2 relate to branch offices and payday lenders. These issues do not have a direct revenue requirement impact and are not addressed here.

[12] Motion of Joint Parties, p. 2, lines 4-5.

The Decision's basis for identifying selected issues as "unresolved," is a Joint Response to ALJ Long's Questions Regarding 2008 Test Year Settlements. The Joint Response refers to "policy issues." "Policy issues" represent differences in methods proposed by parties for forecasting costs in various accounts. The Settling Parties negotiated a revenue requirement outcome for *all* of the accounts, including those for Depreciation, Incentive Compensation, Working Cash and the ESOP tax deduction. The Settlement Agreements specifically state that the issues relating to Depreciation,[13] Working Cash[14] and the ESOP tax deduction[15] are all subsumed in the revenue requirement agreed to by the Settling Parties. For Incentive Compensation, the Settling Parties agreed on an amount, and also specifically stated that the amount "does *not* resolve any policy issues related to the funding of these items."[16] As TURN pointed out in its Comments, the purpose of settling is often to avoid the adoption of a specific methodological outcome.

The Decision adopts the Revenue Requirement Settlements, but then selects a handful of issues out of all those resolved within the Settlement Agreements purportedly to "... resolve these litigated disputes to provide both a critical review of the current unpersuasive arguments and guidance for the next proceeding."[17] DRA and TURN recommend that the sections of the Decision relating to Depreciation expense, Incentive Compensation, Working Cash, and the ESOP tax deduction be removed entirely. Inclusion of this so-called "critical review" and "guidance for the next proceeding" is an impermissible attempt at prior restraint on free speech and violates the U.S. and California Constitutions. In addition to the text of Sections 5.2, 5.2.3, 5.2.4, 5.2.4.1, 5.2.5 and 5.2.6, the corresponding Findings of Fact, 18, 19, 23, 24, 25, 27 and 28 and Conclusions of Law 21 and 23 should also be removed.

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[13] SoCalGas Settlement, Section III.P; SDG&E Settlement, Section III.Q.

[14] SoCalGas Settlement, Section IIIU; SDG&E Settlement, Section IIIV.

[15] SoCalGas Settlement, Section IIIQ.

[16] SoCalGas Settlement, Section III L; SDG&E Settlement, Section III.M, emphasis added.

[17] D. 08-07-046, Section 5.2, p. 18, emphasis added.

A. The Decision's "Guidance" Relating to Depreciation Testimony in Future Proceedings Violates the U.S. Constitution and the California Constitution

One of the issues the Decision lists as an "unresolved test year issue," is "whether or not, as a matter of policy, the CPUC should consider the proposals raised by TURN (with respect to SoCalGas only) or DRA related to the calculation of SoCalGas or SDG&E depreciation expense."[18] As noted above, the Settlement Agreements resolve the revenue requirement for Depreciation expense.[19]

The PD and APD, on which D. 08-07-046 is based, originally included the following:

> The alternative methodology proposed by TURN was not adopted in the most recent Pacific Gas & Electric Company (PG&E) and Southern California Edison Company (SCE) GRCs. We therefore deny with prejudice the recommendations of DRA, TURN and UCAN on depreciation and net salvage. The purpose of this denial is to avoid an unnecessary repetition in subsequent proceedings.[20]

After DRA and TURN filed Comments pointing out the legal errors in this language, Decision 08-07-046 modified the text so that it now says:

> The alternative methodology proposed by TURN was not adopted in the most recent Pacific Gas & Electric Company (PG&E) and Southern California Edison Company (SCE) GRCs. We would therefore have denied with prejudice the recommendations of DRA, TURN and UCAN on depreciation and net salvage in a litigated decision. The purpose of this denial is to avoid an unnecessary repetition in subsequent proceedings.[21]

Couching this content-based proscription in the conditional tense does not redeem it. Calling it "guidance" rather than "strictures" does not change the fact that it is still an attempt at prior restraint of the rights of DRA, TURN and UCAN to free speech in future

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[18] D. 08-07-046, Section 5.2, (c), pp. 19-20.

[19] SoCalGas Settlement, Section IIIP; SDG&E Settlement, Section IIIQ.

[20] PD Section 5.2.4, p. 22

[21] D.08-07-046, p. 22, changes from the PD are underlined.

proceedings.[22] Including this language in the Decision is a violation of the U.S. and California Constitutions.

To begin with, the First Amendment to the U.S. Constitution provides that:

> Congress shall make no law ...abridging the freedom of speech, .. or the right of the people .. to petition the Government for a redress of grievances."[23]

The First Amendment is applied to the states by the Fourteenth Amendment which provides that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States.[24]

The California Constitution similarly provides that:

> Every person may freely speak, write and publish his or her sentiments on all subjects... A law may not restrain or abridge liberty of speech..."[25]

The California Constitution also provides that:

> The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.[26]

The U.S. Supreme Court has interpreted these Constitutional provisions to apply to administrative agencies. As the U.S. Supreme Court held:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. The same philosophy governs *the approach of citizens or groups of*

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[22] Southern California Edison Company (SCE) filed Reply Comments saying that DRA's free speech concerns were unwarranted because "all tribunals have the inherent power to decide what testimony they will hear." (SCE's Comments, p. 2.) Certainly, the Commission can exclude testimony that is irrelevant. If, for example, a utility does not seek ratepayer funding of Executive Incentive Compensation in a General Rate Case, then the Commission may have the power to decide not to hear testimony on the issue in that GRC. What the Commission does not have the power to do is to restrict testimony in future proceedings because it disagreed with the message in this one.

[23] U.S. Const., 1st Amend.

[24] U.S. Const., 14th Amend.

[25] Cal. Const., art. I, § 2.

[26] Cal. Const. art. I, §3.

> *them to administrative agencies* (which are both creatures of the legislature and arms of the executive) and to courts, the third branch of Government. *Certainly the right to petition extends to all departments of the Government*.[27]

The U.S. and California Constitutions guarantee citizens, and groups, the right to use "... the channels and procedures of state and federal agencies and courts to advocate their causes."[28] If a branch of government seeks to restrict freedom of speech or invade the right to petition, then that governmental entity bears the burden of proving the constitutionality of its actions; content-based regulations are presumptively invalid.[29]

In a 1992 decision, the U.S. Supreme Court struck down an ordinance of the City of St. Paul prohibiting conduct that a person "...knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion."[30] In so doing, the Court found that the "...ordinance goes even beyond mere content discrimination to actual viewpoint discrimination."[31] The Court noted that, by selectively prohibiting some messages but not others, the city was "seeking to handicap the expression of particular ideas."[32] As the Court put it, "St Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[33]

D.08-07-046, as currently written, violates the principle that "…the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed."[34] To "deny with prejudice" the right of DRA, TURN and UCAN to

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[27] *California Motor Transport Co et al. v. Trucking Unlimited et al.* (1972) 404 U.S. 508, 510; 92 S.Ct. 609, italics added.

[28] 404 U.S. 508, 511.

[29] *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 382, 112 S.Ct. 2538. *See also U.D. Registry v. State of California* (2006) 144 Cal App 4th 405, 418.

[30] 505 U.S. 377, 396.

[31] Id. at p. 391.

[32] Id. at p. 394.

[33] Id. at p. 392.

[34] *Turner Broadcasting Systems v. FCC* (1994) 512 U.S. 622; 114 S. Ct. 2445.

present their recommendations on the subject in the next proceeding is clearly an impermissible attempt at prior restraint on free speech. For the Commission to say that it "*would have*" denied with prejudice otherwise permitted speech does not save the Decision. The effect is identical – to prevent DRA, TURN and UCAN from exercising their right to free speech in future proceedings because of hostility to the ideas they expressed in this one.[35]

This attack on the Constitutional rights of DRA, TURN and UCAN is as unnecessary as it is unlawful. SDG&E and DRA, and SoCalGas, DRA and TURN settled on a revenue requirement amount for the depreciation and net salvage issues. Since the Decision adopts those Settlements, there is no depreciation issue pending before the Commission in this case. This portion of Section 5.2, and Sections 5.2.4 and 5.2.4.1 should be removed entirely from the Decision along with Findings of Fact 18, 19 and 25.

B. The Decision's "Guidance for the Next Proceeding" on Funding for Incentive Compensation Plans Violates the U.S. Constitution and the California Constitution

The Decision includes as another "unresolved test year issue" "[w]hether or not, as a matter of policy, the CPUC should assign Sempra Energy shareholders with responsibility for funding SoCalGas or SDG&E incentive compensation plans."[36] As noted above, the Settling Parties agreed to Administrative and General expense levels which include funding for Incentive Compensation. Specifically, the Settlements fund "...$0 associated with Long-Term Incentive Plan in FERC 920.1 and 50% of Incentive Compensation and Special Recognition awards requested in FERC 920.2."[37] The Settlement Agreements explicitly state that the parties do not resolve any *policy issues* related to the funding of these items.[38]

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[35] 505 U.S. 377, 382.

[36] D.08-07-046, Section 5.2, p. 19; Section 5.2.3, p. 22.

[37] SoCalGas Settlement, Section IIIL; SDG&E Settlement Section, Section IIIM.

[38] Id.

The Decision, although it adopts the revenue requirement the Settling Parties agreed to for Incentive Compensation, then includes the statement that "[w]e find no merit in DRA's argument that shareholders should fund any portion of market-based employee compensation."[39] To include this prior restraint language "as guidance for the *next proceeding,"* is an impermissible attempt to "... handicap the expression of particular ideas"[40] in future speech.

With no disputed issue as to the funding of Incentive Compensation left to resolve in this case (once the Settlement Agreement was adopted), inclusion of this unnecessary rejection of a DRA position as "guidance for the next proceeding" violates the U.S. Constitution and the California Constitution. Moreover, this so-called guidance is inconsistent with prior Commission decisions on this issue in cases where Incentive Compensation was *not* settled.[41] Section 5.2.3 along with Finding of Fact 23 and Conclusion of Law 21 should be removed entirely from the Decision.

C. The Decision's "Guidance for the Next Proceeding" on DRA's Position on Working Cash Violates the U.S. Constitution and the California Constitution

The Decision includes Working Cash in the list of "unresolved test year issues" which "...it behooves us to resolve … to provide ... guidance for the next proceeding."[42] Although the Decision adopts the Settlements which resolve the Working Cash revenue requirement, the Decision then needlessly rejects DRA's original recommendation to remove Working Cash amounts sought by the Sempra Utilities because they were not required minimum bank deposits.

The Decision says:

> We believe, however, the parties are better served by looking to the purpose of any standard practice when setting reasonable rates than any narrow parsing of the language.

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[39] D.08-07-046, p. 22.

[40] 505 U.S. 394.

[41] *See, e.g., Application of PG&E* (2000) D.00-02-046, p. 260 (Section 9.2.2.2.3); *Application of Southern California Edison Company* (2006) D. 06-05-016, p. 144 (Section 15.8).

[42] D.08-07-046, Section 5.2, p. 18; Section 5.2.5, p. 27.

> The standard practice does not make any effort to narrowly construe the language and DRA offers no Commission decisions which make the narrow interpretation it proposed here.[43]

The Decision then goes on to say:

> Another recommendation for working cash proposed an adjustment for customer deposits. We will not review it in detail because we adopt a settlement.[44]

Since, as the Decision itself notes, the Settlement Agreements resolve the revenue requirement for Working Cash, and the Decision adopts the Settlement Agreements, there is no legitimate purpose served by inclusion of this gratuitous rejection of a position subsumed in those Agreements. On the contrary, to include this language as "guidance for the next proceeding," is to "seek to handicap"[45] the position taken by DRA in the future. Section 5.2.5, and Findings of Fact 24 and 27 should be removed entirely from the Decision.

D. The Decision's "Guidance for the Next Proceeding" on TURN's Position on Employee Stock Ownership Plan – Tax Deduction Violates the U.S. Constitution and the California Constitution

The Decision includes TURN's original position on Employee Stock Ownership Plan – Tax Deduction in the list of "unresolved test year issues" which "it behooves us to resolve … to provide ... guidance for the next proceeding."[46] TURN's proposal was that the utility tax allowance calculation should include the benefit of the tax deduction for dividend payments attributable to the Sempra shares held by utility employees in the employee stock ownership plan.

In the Settlement Agreement between SoCalGas, TURN and DRA, "[t]he Joint Parties agree that TURN's ESOP issues for SoCalGas are subsumed and resolved within

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[43] D.08-07-046, p. 27. DRA did not include the citation in its brief, but notes that the Commission in the TY 2006 SCE GRC adopted a zero cash balance. (D.06-05-016, Appendix C, p. C-23, line 1.)

[44] D.08-07-046, p. 27.

[45] *See* 505 U.S. 377, 394.

[46] D.08-07-046, Section 5.2, pp. 18, 29.

this Agreement."[47] Since, as the Decision itself notes, the Settlement Agreements resolve the revenue requirement for Taxes on Income, and the Decision adopts the Settlement Agreements, there is no legitimate purpose served by inclusion of this gratuitous rejection of a position subsumed in those Agreements. On the contrary, to include this language as "guidance for the next proceeding" is to "seek to handicap" the position taken by TURN.[48] This so-called "guidance" is "an actual viewpoint based discrimination" that violates the U.S. Constitution and the California Constitution. Section 5.2.6, Finding of Fact 28 and Conclusion of Law 23 should be removed entirely from the Decision.

V. UCAN'S OPPOSTION TO THE SDG&E SETTLEMENT BETWEEN SDG&E AND DRA DOES NOT EXCUSE THE CONSTITUTIONAL VIOLATIONS

As both DRA and TURN pointed out in their Comments to the PD, the language rejecting, for future proceedings, the positions DRA and TURN took on four settled issues was both unnecessary and legal error. The Decision's attempt to address those errors is as follows:

> This decision provides guidance to all parties where, regardless of the settlements before us, we found herein various litigation positions to be unpersuasive. SCE and PG&E correctly point out that the settlements were contested by UCAN and that resolving issues litigated by UCAN, and unresolved by the settlements, was a necessary party[49] to analyzing the settlements themselves in light of the whole record.[50]

The use of the term "guidance" as a euphemism for an impermissible prior restraint on free speech is discussed above in Section IV of this Application. "Guidance" as a euphemism for an impermissible attempt to prejudge issues or bind future Commissions is discussed below in Section VII.

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[47] SoCalGas Settlement, Section III.Q.

[48] See 505 U.S. 377, 394.

[49] DRA and TURN assume, for purposes of addressing this argument, that the word intended was "part."

[50] D.08-07-046, p. 89.

In this section, DRA and TURN address the statement in D.08-07-046 that "SCE and PG&E correctly point out that the settlements were contested by UCAN[51]," as if that necessitates the so-called "guidance." The argument is factually incorrect and legally unsupportable.

First, UCAN did *not* contest the Revenue Requirement Settlement Agreement between SoCalGas, TURN and DRA. No party contested the Revenue Requirement Settlement Agreement between SoCalGas, TURN and DRA.[52] In fact, D.08-07-046 itself refers to the SoCalGas Revenue Requirement Settlement as "unopposed."[53]

UCAN *did* contest the Revenue Requirement Settlement Agreement between SDG&E and DRA. UCAN's Comments opposing the "Partial-Party Settlement of the SDG&E General Rate Case" list 31 "Major Issues Raised by UCAN and Disregarded by Movants." Only one reference on that list actually mentions an issue included in the Decision's "Unresolved Test Year Issues" affecting the revenue requirement. That is the issue of Working Cash. As to that issue, UCAN's Comments say that the SDG&E Settlement did not address "UCAN's recommendation to reduce accounts receivable rate base (part of working cash) by $4.4 million because SDG&E had hired staffers to reduce the level of receivables."[54]

The Decision does not address UCAN's Comment on Working Cash at all, but instead seeks to suppress DRA's right to raise a completely different Working Cash position in the next proceeding. To use the argument that UCAN's Comments justify restricting free speech is to rely on a pretext that should be explicitly rejected.

In a 1999 case involving the City of Anaheim's attempt to bar an "adult cabaret" establishment, a California court considered and rejected an effort to shore up an

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[51] Utility Consumers Action Network

[52] While D.08-07-046 acknowledges this on page 16, on page 19, the Decision states as follows: "We also note that TURN did not settle with SoCalGas...." The statement on page 19 is clearly incorrect and should be removed.

[53] D.08-06-046, p. 16.

[54] UCAN's Comments, p. 10.

impermissible restriction on freedom of expression.[55] In that case, the court found that the City's position:

> ...strays beyond the bounds of reason. None of the interests which typically justify regulations of adult businesses (decreased property values, prevention of crime, prevention of blight) could have been in any way implicated by a single wedge- shaped vacant lot next to a freeway on which no one in his or her right mind would ever construct a residence. In such a situation, the use of the power to zone as a pretext for suppressing expression is practically telegraphed to a neutral observer.[56]

To suggest that it is UCAN's Comments opposing the SDG&E settlement that necessitate prior restraints on future DRA and TURN positions is similarly "beyond the bounds of reason" given that UCAN's Comments do not address DRA's position on Incentive Compensation or Working Cash, or TURN's position on ESOP tax deductions. As to Depreciation expense, UCAN's Comments on the SDG&E Settlement cannot be used as a pretext there either since UCAN's Comments do not address that part of the Settlement. UCAN's opposition to the SDG&E/ DRA Revenue Requirement Settlement does not excuse the Constitutional violations in D.08-07-046.

VI. STATEMENTS OF THE BENIGN INTENT OF THE UNCONSTITUTIONAL RESTRAINTS ON FREE SPEECH DO NOT CURE THE VIOLATIONS

In discussing parties' Comments on the Proposed Decision, D.08-07-046 states:

> We note in particular DRA's concern, echoed by TURN, that the decision would abridge the rights of parties to petition the Commission. *We neither make nor intend any such abridgement: DRA may, in future proceedings, make any argument or factual assertion it believes will benefit the record at that time. This decision provides guidance to all parties where, regardless of the settlements before us, we found herein various litigation positions to be unpersuasive*[57].

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[55] *Gammoh v. City of Anaheim* (1999) 73 Cal. App. 4th 186.

[56] 73 Cal.App. 4th 197.

[57] D.08-07-046, p. 89, emphasis added.

As discussed above, the language in Sections 5.2, 5.2.3, 5.2.4, 5.2.4.1, 5.2.5, and 5.2.6 relating to Depreciation, Incentive Compensation, Working Cash and ESOP tax deductions, and the corresponding Findings of Fact and Conclusions of Law of the Decision *do* abridge the rights of parties to petition the Commission regardless of the Commission's "intent." Nor does the offer that DRA can make any argument in future proceedings cure the free speech violations, followed, as it is, by the statement that the positions the Commission disagrees with in this case, it has already decided will be unpersuasive in the next.

When the unconstitutional passages described above are removed from D.08-07-046, the passage italicized above should be removed as well.

VII. THE "GUIDANCE FOR THE NEXT PROCEEDING" VIOLATES PUBLIC UTILITIES CODE SECTION 1708

Apart from the fact that the Commission cannot, for Constitutional reasons, legally bar DRA, TURN, UCAN, or any other party, from presenting otherwise relevant proposals in future proceedings simply because the Commission does not agree with them in this one, the Public Utilities Code also prohibits this Commission from attempting to bind future Commissions as D.08-07-047 would do.

Public Utilities Code Section 1708 provides that, with proper notice and an opportunity to be heard, a future Commission may rescind, alter or amend previous decisions. As the Commission itself has noted, Section 1708 prevents any Commission from binding future Commissions.[58] Thus, the Commission has found that it "…cannot make blanket pronouncements that are binding upon future Commissions,"[59] and that, in fact, "it would be misleading," to suggest that one Commission has the ability to bind future Commissions.[60]

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[58] See, e.g. *Application of PG&E* (2004) D.04-05-055, Section 7.5, p. 42; 2004 Cal. PUC LEXIS 254 *59; *In the Matter of the Fruitridge Vista Water Company* (Application for Rehearing) (2006) D.06-09-040, p. 3.

[59] *Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program* (2006) D. 06-07-031, p. 23.

[60] *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships*

(continued on next page)

Clearly, attempts to restrict in advance what DRA, TURN and other parties say in future proceedings violate the U.S. Constitution, the California Constitution, and the Public Utilities Code. Nor should the Commission want to impose such blanket restrictions. As times change, and priorities shift, this Commission, and its successors, should welcome the free exchange of views and ideas.

Moreover, the directives in this Decision that intervenors who represent ratepayer interests *not* raise issues in future proceedings gives the appearance of prejudging evidence in future proceedings. Considering that the regulated utilities continue to promote policies which the Commission has repeatedly rejected, this appearance of prejudging the evidence ratepayer advocates offer should be of serious concern to the Commission. For example, as TURN pointed out in its Comments, SoCalGas has repeatedly pushed the "rental method" for marginal customer cost analysis despite multiple Commission decisions rejecting the approach.[61] More recently, PG&E and SoCalGas have combined in late 2007 to propose a different allocation methodology for CARE costs, despite firm Commission rejection of similar proposals in both PG&E's last BCAP[62], decided in 2005, and SoCalGas' last BCAP, decided in 2000.[63]

VIII. BASING FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ERRORS IS ARBITRARY AND CAPRICIOUS

Decision 08-07-046 includes statements and discussions on a number of issues that are either factually incorrect or fail to address evidence in the record. Basing Findings of Fact and Conclusions of Law, and so-called "guidance" on these errors or omissions is arbitrary and capricious and does not meet the requirement that Commission

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Between Energy Utilities and their Affiliates Adopted By the Commission in Decision 97-12-088 (1998) 84 CPUC 2d 155, 177; D. 98-12-075.

[61] See, e.g., A.08-02-001, the SoCalGas BCAP. This issue is discussed in TURN's Protest to A.08-02-001, filed on March 7, 2008 and available on the CPUC website.

[62] Biennial Cost Allocation Proceeding.

[63] See A.07-12-006. The history of Commission decisions rejecting similar utility proposals is contained in TURN's Protest (filed January 14, 2008) and Motion to Dismiss (filed February 26, 2008) which are available on the CPUC website.

decisions be supported by findings and the findings supported by substantial evidence in light of the whole record.[64]

A. Errors Relating to the Positions of DRA, TURN and UCAN on Depreciation

As discussed above, Sections 5.2.4 and 5.2.4.1 relating to Depreciation expense should be removed entirely. They are unnecessary in light of the fact that the Decision adopts the Revenue Requirement Settlements, and the "guidance" they purport to offer is unconstitutional. Removal of just the unconstitutional provisions alone would not salvage the Sections since the rest of the discussion is so filled with factual errors and omissions that it could not withstand judicial scrutiny.

The Decision states that "[w]e find, as discussed below, intervening parties were not persuasive here, and have also failed to persuade the Commission in other recent proceedings, that the current depreciation practices are unreasonable or incorrect."[65] This statement is factually incorrect.

DRA's testimony on depreciation and net salvage was based on the same traditional methodology used by the Sempra Utilities. DRA's proposals, however, also incorporated the Commission's statements in a 2000 decision cautioning against using a "mechanistic" approach to depreciation "… not effectively tempered by judgment."[66] Thus, DRA removed certain anomalous years from its analysis, a method of forecasting the Commission accepted in the TY 2006 SCE GRC.[67]

The Decision also states that "… the alternative methodology proposed by TURN was also rejected in the most recent Pacific Gas & Electric Company (PG&E) and Southern California Edison Company (SCE) GRCs."[68] The implication in the statement that TURN's analyses and proposals in this proceeding were identical to proposals rejected or mooted in prior proceedings is factually incorrect, as the prior GRC decisions

[64] Public Utilities Code Section 1757.

[65] D.08-07-046, p. 23.

[66] D.00-02-046, p. 360.

[67] *Application of Southern California Edison Company* (2006) D.06-05-016, p. 209.

[68] D.08-07-046, p. 23.

indicate. In the SCE GRC decision (D.06-05-016), the Commission agreed with TURN and DRA that there is reason to be concerned about the degree to which cost inflation drove projected increases to costs of removal.[69] While the Commission stated that it was "not convinced that the net present value methodology as proposed by TURN should be adopted," it expressly anticipated that TURN might wish to reintroduce that methodology, and suggested the type of showing that would be called for in that instance.[70]

The PG&E GRC described TURN's recommended depreciation rates in that case as relying on a "normalized net salvage approach" that used the average of recent recorded costs of removal, rather than a net present value calculation relying on the utility's forecasts of future removal costs.[71] Again, while the Commission adopted the depreciation rates included in the PG&E/DRA settlement rather than TURN's recommendations, it provided true guidance, not an impermissible prior restraint of speech or prejudgment of evidence, as to the type of showing TURN should consider making in the next PG&E GRC if TURN decided to pursue a net present value-based approach there.[72]

In this GRC, the TURN/UCAN testimony proposed depreciation rates that sought to mitigate the effect of inflation by using the most recent five years of each Company's actual net salvage expenditures to calculate net salvage ratios.[73] In its brief, TURN proposed, in the alternative, using the net present value of the Sempra Utilities' own proposed future cost of removal estimates as the basis for the adopted depreciation rates.[74] Thus, over the course of the most recent GRCs, TURN's depreciation recommendations have evolved in an ongoing attempt to better address the Commission-

[69] D.06-05-016, p. 206.

[70] D.06-05-016, pp. 210-211.

[71] D.07-03-044, p. 219. The Commission also declined to order a "net present value" study for the next PG&E GRC. (p. 232).

[72] D.07-03-044, p. 233.

[73] Ex. TURN/UCAN-6, pp. 33-37, 45-46.

[74] TURN Opening Brief, pp. 136-145.

recognized issues regarding inflation embedded in depreciation rates, while being responsive to the concerns raised in the prior GRC decisions regarding the TURN recommendations presented in those cases.

In Section 5.2.4.1, the Decision says, "[a]s discussed below, we find that we disagree with the changes proposed by DRA and TURN/UCAN. Also, we did not adopt the TURN/ UCAN proposals in both of the recent GRCs for PG&E and SCE and we do not adopt them here."[75] The Decision does not identify any proposal or argument advanced by TURN that was explicitly rejected in a prior proceeding, much less explain how that proposal or argument is identical to the proposals presented in the TURN/UCAN testimony here. In both cited decisions, the Commission expressed its interest in better understanding the degree to which assumptions about future inflation are embedded in the proposed depreciation rates. TURN's analysis and proposals to identify and address future inflation of removal costs in depreciation rates continues to evolve to address the concerns or questions the Commission has raised in past decisions. Unfortunately, D.08-07-046 does not address the issue itself, but instead inaccurately labels the TURN/ UCAN position as identical to previous positions TURN had taken in previous GRCs. There is no detail or analysis to permit any party to understand the reasoning, much less the purported outcome on these issues.

The discussions in Sections 5.2.4 and 5.2.4.1 of D.08-07-046 are either not supported or are directly contradicted by the record and the express language of the previous GRC decisions that are purportedly the basis for the outcome in D.08-07-046. Inclusion of this discussion, associated Findings of Fact,[76] Conclusions of Law, and so-called "guidance" is arbitrary and capricious. These sections should be removed entirely from this Decision.

[75] D.08-07-046, p. 24.

[76] See, e.g., Findings of Fact 24 and 25.

B. Errors Relating to DRA's Position on Incentive Compensation Pay

Public Utilities Code Section 1757 requires that Commission decisions be supported by findings, and the findings supported by substantial evidence in light of the whole record. The Decision's summary of DRA's original position regarding Incentive Compensation is so incomplete that it does not meet the standard set forth in Section 1757.

DRA's original position on Incentive Compensation was that ratepayers should fund 50% of the Sempra Utilities' Incentive Compensation program. DRA's testimony reviewed the program plan designs over the years, the employees eligible and the payouts. For example, DRA's testimony showed that the Incentive Compensation plans of SDG&E and SoCalGas include Financial Measures weighted at 40% associated with the net income achieved by Sempra Energy and the Sempra Utilities with no payout for the measure if the Sempra Utilities' net income was $425 million or less.[77]

The Decision does not address this evidence. There is no explanation of why this evidence has no merit relative to the issue of the reasonableness of the compensation forecasts, or how ratepayers benefit from the payout associated with Financial Measures, or why, when Sempra Utilities' net income exceeds $425 million, ratepayers should be required to fund this forecasted portion of Incentive Compensation. The Decision's incomplete discussion of record evidence does not meet the standard of Public Utilities Code Section 1757.

As to the Sempra Utilities' Long-Term Incentive programs (LTIPs), DRA's original position was that these stock options should be funded entirely by shareholders. DRA's testimony provided a breakdown of these expenses over the historical period showing that they benefited only a small group of the Utilities' most highly paid employees.[78] For example, the evidence showed that SDG&E's LTIP for its executives was 27.1% above market levels and its LTIP for top directors was 110.8% above market

[77] DRA Opening Brief, pp. 367 et seq., pp. 395 et seq.; Ex. DRA-14, p. 14-32 -33; Ex. DRA-14-WP, p. 82, 85; Ex. DRA-35, p. 35-34 – 37.

[78] Ex. DRA-35, pp. 35-35 – 35-37; Ex. DRA-14, pp. 14-37 – 14-40.

levels.[79] For SoCalGas' executives, LTIP was 127.5% above market levels and, for top directors, was 118.7% above market levels. The Decision does not address this evidence either.

Instead, the Decision says "We find no merit in DRA's argument that shareholders should fund any portion of market-based employee compensation,"[80] and discusses only a part of the Total Compensation Report prepared by a consulting firm. The Decision concludes that, "[b]ecause total compensation is reasonable, (defined as prevailing market rates for comparable skills) the ratepayers should reasonably fund a revenue requirement that includes the full market-based employee compensation for adopted levels of staff."[81] This conclusion is legal error.

Even if the revenue requirement associated with this issue were still unresolved, merely because a consulting firm finds the Sempra Utilities' total compensation is statistically "at market" does not discharge the Commission from its responsibility to determine whether including all portions of compensation in rates is "just and reasonable." In fact, the purported "guidance" presented in D.08-07-046 is inconsistent with previous Commission decisions in which the issue was fully litigated and *not* settled by the parties. For example, in the last PG&E GRC that did not settle the issue, the Commission said:

> We find no compelling evidence for a change in our current practice of allowing 50% recovery of targeted incentives from ratepayers. As we have held, shareholders and ratepayers alike benefit from the good performance that incentive programs such as PIP seek to encourage. We continue to believe that equal sharing of costs is fair, and that it provides appropriate incentives to the utility to perform in ways that benefit ratepayers and shareholders alike.[82]

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[79] DRA Opening Brief, p. 404; Ex. SDG&E-13, SDG&E's Total Compensation Study, p. 3.

[80] D.08-07-046, Section 5.2.3 p. 22.

[81] D.08-07-046, Section 5.2.3., p. 22.

[82] D.00-02-046, p. 260.

In SCE's last GRC, the Commission found that some executive compensation costs should be assigned to shareholders stating:

> We recognize that executive compensation, which consists of both base pay and incentive pay, was evaluated as part of the Total Compensation Study, and, in total, SCE's compensation was at market levels. In our decision today, we are not recommending reduced compensation for executive officers. We are merely assigning certain costs to shareholders. This does not appear to be contrary to the purpose of the Total Compensation Study, which obtained competitive compensation data and compared that data to SCE's compensation levels.[83]

The reference in D.08-07-046 to the Total Compensation Study in this case does not explain why the levels of incentive compensation for the Sempra Utilities' executives and top directors are reasonable within the context of the Decision's definition of "prevailing market rates for comparable skills." This incomplete description of the evidence does not meet the standard that Commission decisions be supported by findings and the findings supported by substantial evidence in light of the whole record.

Since the revenue requirement associated with Incentive Compensation is resolved by the Settlement Agreements, which the Decision adopts, this discussion is also unnecessary. Section 5.2.3 and Conclusion of Law 21 should be removed entirely from the Decision.

C. Errors Relating to DRA's Position on Working Cash

Finding of Fact 27 states that "DRA's proposed exclusion of cash deposits is not consistent with the intent of working cash standard practice U-16." As noted above, DRA's proposed exclusion of cash deposits is consistent with the Commission's decision in the last SCE GRC.[84] Finding of Fact 27 is unnecessary and not supported by substantial evidence in light of the whole record.

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[83] D.06-05-016, p. 144.

[84] D.06-05-016, Appendix C, p. C-23, line 1.

D. Errors Relating to the Use of Recorded 2006 Data

Section 3.1 of the Decision includes a discussion of the Use of Recorded 2006 Data by parties in this case. The discussion contains factual errors and material omissions and thus its inclusion, and corresponding Finding of Fact 3, is arbitrary and capricious. Moreover, as nothing in Section 3.1 is necessary to support the Commission's adoption of the Settlements, the entire section and Finding of Fact 3 should be removed from the Decision, or, at least, corrected to reflect the record.

Section 3.1 says:

> However, we find that the 2006 data was not in a format compatible with the adjusted data for 2005 and prior years. We therefore agree with SDG&E and SoCalGas that it is unreasonable in this instance to use unadjusted 2006-recorded data to substitute for the 2006 forecast based on adjusted 2005-recorded data because it is an inconsistent base for re-forecasting 2007 and 2008.[85]

The Decision is discussing an issue that is no longer in dispute and is thus unnecessary to support adoption of the Settlements. Moreover, the statements used to support this conclusion are factually incorrect or so incomplete that they are not supported by substantial evidence in light of the whole record.

For example, the Decision does not mention the evidence in the record that 2006 recorded data provided by SDG&E for its Electric Distribution Capital Expenditures and used by DRA *was* in a format compatible with 2005 data and prior years.[86] The Decision also fails to mention that SDG&E and SoCalGas represented to DRA that the 2006 recorded data they provided in late March 2007 *was* "adjusted."[87] The Decision also does not mention that one utility witness testified that some errors in the 2006 recorded expenses were discovered in his area in early April 2007, but the Sempra Utilities case management team decided not to inform DRA of this discovery.[88]

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[85] D.08-07-046, p. 9.

[86] 13 RT 1503, Wilson/ DRA.

[87] Ex. DRA-46; 8 RT 651, P. Baker/ SDG&E/ SCG.

[88] 9 RT 809-811, Krumvieda/ SDG&E/SCG.

The Decision goes on to say:

> Neither DRA nor any other intervenor used 2006-recorded data for every instance of re-forecasting 2007 and deriving a different Test Year 2008. In fact, SDG&E and SoCalGas assert that the intervenors only used 2006-recorded data when the unadjusted 2006-recorded data was a lower amount than the applicants' forecast 2006. *No party rebutted this assertion.*[89]

In fact, no party had *an opportunity to submit rebuttal testimony* showing that the assertions of SDG&E and SoCalGas were incorrect. The implication that intervenors only used unadjusted 2006 recorded data when it yielded a lower amount is also factually incorrect. For example, as is clearly shown in DRA's testimony on capital expenditures for SDG&E, roughly half of the 2006 recorded amounts DRA used were higher than the amounts originally forecasted by SDG&E.[90] If the intent of the passage quoted above is to suggest that SDG&E and SoCalGas consistently used the same base for their forecasts, then it is also factually incorrect. In some areas, SDG&E and SoCalGas used 2006 recorded data to justified requested increases.[91]

As TURN noted in its brief on the issue, the total amount of Operations and Maintenance (O&M) spending in 2006 as well as some account-specific data can be used to verify forecasting accuracy irrespective of format compatibility. There were, for example, some accounts where the 2006 recorded spending was so much lower than the forecast completed just earlier in 2006 that no amount of "adjustments" could possibly have mitigated the conclusion that the utilities' forecast methodology produced excessive results.[92]

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[89] D.08-07-046, p. 9, emphasis added.

[90] Ex. DRA-07, p. 7-3, Table 7-1.

[91] *See e.g.,* Ex. SCG/SDG&E-213, pages 3, 8-9 where the utility witness uses 2006 actual recorded for revised forecasts as well as 2007 spending to justify the revised 2007 forecast. In Ex. SDG&E-211, pages 12-13, the SDG&E witness uses updated 2006 data and also YTD 2007 data. In Ex.SDG&E-204, at page 12, the SDG&E witness offers testimony on positions added in "2006-07." In SDG&E-225, p. 11, the SDG&E witness uses "Actual PLPD 2006 costs."

[92] In Account 588, SDG&E proposed adjustments totaling $2.6 million but underspent the account by $3 million. TURN Opening Brief, p. 12, fn. 27, citing Ex. TURN/UCAN-4, pp. 7-13.

On a company-wide basis, the utilities' 2006 forecast was 2-3% higher than actual recorded spending. This total company-wide O&M spending amount would not be impacted by any potential reallocations of money from one account to another which the company must adjust to go from spending numbers based on operating cost center control accounts, to FERC-USOA accounts.

The Decision does not address any of this evidence. The inaccurate and incomplete description of the evidence does not meet the standard that Commission decisions be supported by findings, and the findings supported by substantial evidence in light of the whole record. Since the Decision adopts the Revenue Requirement Settlements, these factual errors do not affect the outcome of the Decision. Nonetheless, these errors mischaracterize the evidence. Section 3.1 should either be removed or corrected to accurately reflect the record.

IX. CONCLUSION

For all the foregoing reasons, DRA and TURN recommend that the Commission grant this Application for Rehearing and incorporate into Decision 08-07-046 the changes discussed above.

Respectfully submitted[93],

/s/ LAURA TUDISCO

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August 29, 2008

[93] Pursuant to Rule 1.8, counsel for TURN has authorized DRA's counsel to sign this Application for Rehearing on TURN's behalf.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of "**APPLICATION FOR REHEARING OF THE DIVISION OF RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK OF DECISION 08-07-046**" in **A.06-12-009, A.06-12-010 and I.07-02-013** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

[ ] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on August 29, 2008 at San Francisco, California.

/s/ HALINA MARCINKOWSKI

Halina Marcinkowski

N O T I C E

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